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No. 76-1330

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

JOHN DOE,

Petitioner,

v.

E. E. PRINGLE, D. E. KELLEY, R. E. LEE, J. R. CARRIGAN, J. K. GROVES, P. V. HODGES, and W. H. ERICKSON, individually and in their capacities as Justices of the Colorado Supreme Court,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The two opinions of the district court are appended to the petition for certiorari as Appendices C and D. The opinion of the United States Court of Appeals for the Tenth Circuit and its order denying rehearing are appended to the petition for certiorari as Appendices A and B. The opinions below are not reported.

JURISDICTION

The petitioner asserts that this Court has jurisdiction under 28 U.S.C. § 1245(1).

QUESTION PRESENTED

Does the federal district court have jurisdiction to review the decision of the Colorado Supreme Court that the petitioner should not be admitted to practice law in Colorado because he is morally and ethically unqualified?

STATUTES INVOLVED

The petitioner sets forth the relevant federal statutes at 3 of the petition.

STATEMENT OF THE CASE

John Doe, the petitioner, is an unsuccessful applicant for admission to the Colorado bar who brought this action pursuant to 42 U.S.C. § 1983 in federal district court seeking to compel the Colorado Supreme Court to admit him to the practice of law. The federal district court granted the respondents' motion to dismiss the complaint for lack of subject matter jurisdiction and the United States Court of Appeals for the Tenth Circuit affirmed.

Doe was denied admission to the bar because the supreme court found, in two separate orders issued on April 6, 1973 and January 10, 1975, that he was not morally and ethically qualified to practice law. In July, 1970, while he was a third year law student, Doe was arrested in Arizona for illegally importing approximately 420 pounds of marijuana into the state from Mexico. Doe, who was 29 years old at the time, was the pilot of the single engine Cessna

airplane in which the marijuana was found. *See* Complaint, App. J.[1] The airplane's American identification designation had been taped over to look like a Mexican designation, and the Border Patrol apprehended Doe and his companion as they were attempting to remove the tape. Doe resisted arrest and attempted to flee before finally submitting. Two .22 caliber revolvers, which Doe said he and his companion had taken with them for protection in Mexico, were found in the airplane. *See* Complaint, App. H.

After his arrest, Doe completed law school in January, 1971 and, on February 3, 1971, he pleaded guilty to charges of being a transferee of marijuana and failing to pay the required transfer tax. He was sentenced to a two year prison term in a federal correctional institution and was released on August 25, 1972 (Complaint, App. J).

About four months after his release from prison, Doe applied for admission to the bar in December, 1972. He took and passed the February, 1973 bar examination. In accordance with established procedure, the Bar Committee of the Board of Law Examiners interviewed Doe for the purpose of evaluating his moral and ethical qualifications. Doe attempted to explain his participation in the crime on the ground that he was doing a favor to a friend who had saved his life in a skydiving accident (Complaint, App. H). Following the interview, the Bar Committee recommended to the supreme court that Doe not be admitted to practice. The committee found that he was not morally and ethically

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[1] The petition for certiorari contains the complaint and only certain "selected appendices." The petitioner has not included either Appendix J (Doe's application for admission to the Colorado Bar) or Appendix H (Memorandum dated June 7, 1975 from Catharyn Ables, Secretary to the Board of Law Examiners, to Justice Groves transmitting the Bar Committee's file on Doe to the court). References to these appendices in this brief are made to Complaint, App. J or Complaint, App. H.

qualified because of his recent felony conviction and the lack of any special circumstances excusing his conduct (Petition at 84). The supreme court unanimously adopted the committee's recommendation and, on April 6, 1973, advised Doe that he would not be admitted because he was not properly qualified (Petition at 86).

No further action was taken on Doe's application for admission until about nine months later when, on January 15, 1974, counsel for Doe requested that the supreme court reopen his case so that he could demonstrate his current fitness to practice (Petition at 87). The supreme court granted Doe's request and directed the Bar Committee to hold additional hearings (Petition at 88). The committee reconsidered Doe's case at four meetings with Doe and his attorneys on February 26, May 17, September 20 and December 2, 1974 (Complaint, App. H). As part of its deliberations, the committee obtained copies of the sentencing report and suppression hearing connected with Doe's criminal conviction.

After the hearings, the committee transmitted its entire file on John Doe to the supreme court (Complaint, App. H) along with its recommendation that he be admitted to practice (Petition at 89). Without dissent, the supreme court rejected the committee's recommendation and, on January 10, 1975, advised Doe that his application had been denied "on the basis of the proofs submitted on your ethical and moral qualifications." (Petition at 90).

The petitioner did not petition for rehearing in the Colorado Supreme Court or pursue any other remedy in the state courts, nor did he seek to review the state supreme court's action by writ of certiorari to this Court. Rather, he filed the present action in the federal district court on April 15, 1975.

ARGUMENT

I.

THE DECISION BELOW PROPERLY APPLIED THE *THEARD* DOCTRINE IN CONCLUDING THAT THE DISTRICT COURT LACKED JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION.

This case presents no novel or significant legal issue for this Court to consider. Involved is simply the application of a well-established principle, referred to by the courts below as the *Theard* doctrine, to the particular circumstances of this case.

The *Theard* doctrine is derived from *Theard* v. *United States*, 354 U.S. 278 (1957), and from *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) and *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957). Briefly stated, the *Theard* doctrine draws what the district court below termed a "subtle but fundamental distinction" between an action challenging the constitutionality of a statute or rule regulating bar admission and an action seeking to review the state court's judgment in refusing to admit an individual applicant. Petition at 57; *Schware* v. *Board of Bar Examiners of New Mexico, supra*, 353 U.S. at 248 (Frankfurter, J., concurring). In the latter category of cases, the federal district court does not have jurisdiction to review the state court's decision and the disappointed applicant, like the petitioners in *Schware* and *Konigsberg*, must seek review by petitioning this Court for a writ of certiorari to the state court. *See also Willner* v. *Committee on Character*, 373 U.S. 96 (1963).

Numerous lower federal court decisions have made the same distinction relied on by the courts below in this case.[2] The statement made by the Ninth Circuit Court of Appeals is representative:

> [O]rders of a state court relating to the admission, discipline, and disbarment of members of its bar may be reviewed only by the Supreme Court of the United States on certiorari to the state court, and not by means of an original action in a lower federal court. The rule serves substantial policy interests arising from the historic relationship between state judicial systems and the members of their respective bars, and between the state and federal judicial systems. We are persuaded that it [the rule] is sound.

MacKay v. *Nesbett*, 412 F.2d 846 (9th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969).

In this case the court properly determined that Doe's complaint did not challenge the constitutionality of any statute or rule. Doe asserted four claims for relief: (1) that the court violated its own rule (Colo. R. Civ. P. 217) by failing to accept the certification of the Bar Committee that Doe was qualified for admission, thus denying him due process of law under the fourteenth amendment to the United States Constitution; (2) that the court rejected the Bar Committee's recommendation without any factual

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[2]*See e.g.*, Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962); MacKay v. Nesbett, 285 F. Supp. 498 (D. Alaska 1968), *aff'd*, 412 F.2d 846 (9th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969); Ginger v. Circuit Court, 372 F.2d 621 (6th Cir. 1967), *cert. denied*, 387 U.S. 935 (1967); Jones v. Hulse, 391 F.2d 198, 202 (8th Cir. 1968), *cert. denied*, 393 U.S. 889 (1968); Arvelo v. Supreme Court of Puerto Rico, 382 F. Supp. 510 (D.P.R. 1974); Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971).

basis, and that its action was thus arbitrary and capricious and a denial of due process; (3) that the court conclusively presumed that, because of his felony conviction, Doe was unqualified to practice law, thus denying him due process; and (4) that the court denied Doe's application, while it had admitted others who had been convicted of similr crimes, thus denying him the equal protection of the law as guaranteed by the fourteenth amendment to the United States Constitution.

In concluding that the district court lacked subject matter jurisdiction, the court of appeals stated:

> We concur in the district court's finding that it is without subject matter jurisdiction to review a final order of the Colorado Supreme Court denying a *particular application for admission* to the Colorado Bar. This rule applies even though, as here, the challenge is anchored to alleged depri ations of federally protected due process and equal protection rights. The court did not err in distinguishing the above rule from the rule that a federal district court may exercise jurisdiction in relation to review of alleged federal constitutional due process or equal protection deprivations in the state's adoption and/or administration of general rules and regulations governing admission. The district court properly invoked the "Theard Doctrine."

Petition at 34 (emphasis in original).

The district court also stressed:

> [*R*]*eview* of a state court's *adjudication* of a particular application . . . may only be heard, if at all, by the Supreme Court of the United States.

Petition at 59 (emphasis in original).

The petitioner, however, attempts to avoid the application of the *Theard* doctrine by contending that he had no opportunity to present his constitutional claims to the Colorado Supreme Court. Petition at 22-24. This argument, of course, ignores the fact that the petitioner made no effort to raise those issues in the state supreme court. The respondents maintained below, and again assert, that Doe could have filed a petition for rehearing and his claims would have been considered. As evidence that this course of action was available to the petitioner, the respondents point to the fact that Doe sought and obtained rehearing several months after the court first denied his application for admission.

Doe's decision not to raise his constitutional issues in the state court was a tactical error resulting from his mistaken assumption that he had a choice of forum. Because he sought only to reverse the decision in his own case (*see* plaintiff's prayer for relief, Petition at 83), Doe did not, and could not, invoke the jurisdiction of the federal district court. Accordingly, the decisions below were clearly correct.

II.

THERE IS NO CONFLICT OF DECISION.

The petitioner asserts that the decision in the present case conflicts with *Mildner* v. *Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd* 425 U.S. 901 (1976) and with the rationale of *Tang* v. *Appellate Division of the New York Supreme Court, First Department*, 487 F.2d 138 (2d Cir. 1973, *cert. denied*, 416 U.S. 906 (1974). Neither contention has merit.

Mildner v. *Gulotta*, *supra*, involved two types of claims for relief. The first was a challenge by all three plaintiffs

to the constitutionality of § 90 of the New York Judiciary Law. The *Mildner* court held that it had subject matter jurisdiction over this claim but ruled against the plaintiffs and upheld the constitutionality of the statute. 405 F. Supp. at 184-185.

The second type of claim in *Mildner* involved an attack by two of the plaintiffs on the propriety of the disciplinary actions imposed on them. With respect to these claims, the federal court held that it had no jurisdiction and that the plaintiffs' exclusive remedy was to seek review in the United States Supreme Court. *Id.* at 196.

The distinction drawn by the *Mildner* court between the two types of claims is the same distinction drawn by the district court below and approved by the Tenth Circuit. Thus, there is no conflict.

Like *Mildner*, the *Tang* case also involved an attack on the constitutionality of a rule governing admission to practice law in New York, *i.e.*, New York CPLR 9406(3), which required that an applicant for admission be an actual resident of New York for six months. *Tang* v. *Appellate Division of the New York Supreme Court First Department*, 373 F. Supp. 800 (S.D.N.Y. 1972). The district court held that no substantial federal question was presented requiring the convening of a three-judge court and concluded that "the six months' durational requirement is clearly reasonable." 373 F. Supp. at 801, 802.

On appeal, the Second Circuit affirmed on other grounds. The court noted that the plaintiff initially could have challenged the constitutionality of the rule either in the state court or in the federal district court. 487 F.2d at 141, 143. However, because the plaintiff had presented his constitutional claim to the state court and failed to pursue

his state appellate remedies, he was precluded from abandoning the state courts to seek review in the federal district court. *Id.* at 141. *Cf. Hicks* v. *Miranda*, 422 U.S. 332, 351 at n. 20 (1975).

Getty v. *Reed*, 547 F.2d. 971 (6th Cir. 1977), cited by the petitioner in his supplemental petition, adds no weight to his contention that his petition should be granted. The conflict, if any, is between *Getty* and *Tang*, *supra*, on the issue of *res judicata*, an issue which is not involved in the present case. However, it is relevant to this case to note that *Ginger* v. *Circuit Court*, cited in this brief above at n. 2, was reaffirmed in *Getty*. 547 F.2d at 974. This evidences the Sixth Circuit's continuing adherence to the rule applied by the Tenth Circuit in this case.

The case now before this Court is not a case of concurrent jurisdiction. The district court below expressly disclaimed any reliance on *res judicata* or on the plainitiff's failure to reserve his constitutional claims. *See* Petition at 58, n. 5. Unlike the plainitiff in *Tang*, Doe did not have the option of bringing this action in the federal district court. As Judge Breitenstein stated, concurring in the judgment below, "Doe's recourse was to petition the Supreme Court of the United States for certiorari review of the action of the state supreme court." Petition at 47.

CONCLUSION

For the reasons discussed above, the respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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